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No. 90 -

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROBERT GIGANTE,
Petitioner,

v.

RUNSHIP, LTD., and
LAURITZEN REEFERS, A/S,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. In an action for damages under Section 5(b) of the Longshore and Harbor Workers' Compensation Act, may a longshoreman injured while unloading cargo from a vessel maintain an action for negligence against the vessel for injuries caused by the defective stowage of the cargo by an independent stevedore in a foreign loading port where the evidence establishes that the vessel had knowledge of the defective manner in which the cargo was stowed?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Robert Gigante, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered May 8, 1990, affirming the granting of Summary Judgment in favor of respondents in the within proceeding, and the

Order of the United States Court of Appeals for the Third Circuit entered June 5, 1990, denying petitioner's Petition for Rehearing, and in support thereof represents as follows:

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals affirming the decision of the district court is not yet officially reported, and is reproduced in the appendix hereto at page 14a.

The Order of the United States Court of Appeals for the Third Circuit denying petitioner's Petition for Rehearing is not yet officially reported, and is reproduced in the appendix hereto at page 16a.

The Opinion of the United States District Court for the District of New Jersey is not officially reported, and is reproduced in the appendix hereto at page 1a.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on May 8, 1990 (14a). The Order of the United States Court of Appeals for the Third Circuit denying the Petition for Rehearing was entered June 5, 1990 (16a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).[1]

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1. Two other parties, United Trading Company S.A. and Transreefer originally were named as defendants in the action. However, they were never served and the action was dismissed as to them in the district court prior to the filing of the Notice of Appeal. Neither United Trading Company S.A. nor Transreefer were parties in the Court of Appeals.

STATUTE INVOLVED

Section 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b).

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided by this subsection shall be exclusive of all other remedies against the vessel except remedies avail able under this chapter.

LEGISLATIVE HISTORY INVOLVED

The legislative history of the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act appears in House Report No. 92-1441, and is reprinted in 1972 U.S. Code Cong. & Adm. News, Vol. 3, beginning at page 4698. The portion relating to the elimination of the unseaworthiness remedy begins a page 4701 and is reproduced in the appendix hereto beginning at page 18a.

STATEMENT OF THE CASE

Petitioner, Robert Gigante, was injured while working as a longshoreman and engaged in discharging a cargo of palletized units of cartons of apples from the No. 2 hold of the M/V MALAYAN REEFER, a cargo ship which was owned by respondent, Runship, Ltd. and operated by respondent, Lauritzen Reefer, A/S (1a). Petitioner was injured when a unit of the palletized cartons of apples broke apart as it was being lifted from the hold, causing several cartons of the apples to fall back down into the hold and strike petitioner.[2] At the time of the accident, petitioner was working in an area of the cargo stow referred to as the "key." Because this "key" area was too small -- only 13 feet by 13 feet (2a) -- petitioner was unable to step back from under the pallets to a position of safety as the units were being lifted from the hold, and, therefore, was unable to avoid being hit by the falling cartons. In bringing the instant action, petitioner contended that respondents, as the owner and operator of the vessel, respectively, were negligent in providing a cargo stow in which the "key" was too small to permit the longshoreman to work safely, and therefore were negligent in providing a cargo stow which was unsafe and unreasonably dangerous (2a).

In the district court, respondents moved for summary judgment, relying on the Third Circuit's decision *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987). The district court granted this motion, holding that, under *Derr*, a shipowner's observation of an unsafe condition existing in a cargo stow could not be a basis for imposing liability on a shipowner under Section 5(b) of the Longshore and Harbor

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2. The apples were packed in cardboard cartons which were strapped onto wood pallets. The pallets measured 4 feet, 2 inches long, by 3 feet, 4 inches wide, and the cartons were stacked on the pallets to a height of approximately 6½ feet (See Appendix in Court of Appeals, pages 65A-67A). Each pallet with the cartons of apples strapped on it is referred to as a "unit."

Workers' Compensation Act (5a, 11a). The factual background with respect to the manner in which petitioner was injured, the creation of the "key", the vessel's knowledge of the size of the key, and the vessel's knowledge of the manner in which the longshoremen were discharging the cargo, as set forth in the record before the district court on the motion for summary judgment, disclosed the following:

The procedure utilized by the discharging stevedore to discharge the palletized units of apples involved the use of a device known as a chandelier spreader which had forks on it similar to the forks on a forklift truck which could be inserted into the pallets and used to lift the pallets from the hold. However, before the chandelier spreader could be utilized, it was necessary to clear sufficient space in the cargo stow to allow for its use. This would be accomplished by having a certain number of the units of apples "pre-slung", *i.e.*, -- wrapped with nylon cords which could be attached to the ship's cargo hook and lifted from the hold to create an opening in the cargo stow. The opening in the stow thus created was referred to as the "key" (1a-2a, see Appendix in Court of Appeals, pages 50A, 63A).

The "key" would be created by the loading stevedore in the foreign port (in this case Chili) who, in the course of loading the units, would determine which units would be "pre-slung." The size and location of the "key" thus was determined *prior* to the start of cargo operations in the discharging port and was a condition existing at the start of cargo operations in the discharging port.

There was evidence in the record that the foreign stevedore was instructed by respondent, Lauritzen Reefers, A/S to create a key which would be large enough to allow the use of the chandelier spreader, but not larger than that (see Appendix in Court of Appeals, pages 122A-124A), and there also was evidence, that the vessel had *actual knowledge* of the size of the keys that were being created. This included evidence that respondents had a port captain representing them in the loading port when the cargo was loaded

(see Appendix in Court of Appeals, page 86A), that the vessel was provided with a copy of the loading stowage plan which showed the location and size of the keys in the stow (see Appendix in Court of Appeals, page 125A), that the Captain of the vessel signed a certification that the "stowage, shoring, lashing and flooring" of the stow was done to his "entire satisfaction" (see Appendix in Court of Appeals, page 126A), and that respondents had a port captain present during the discharging operation who also was aware of the location and size of the keys prior to the start of cargo discharging operations (see Appendix in Court of Appeals, page 98a).[3]

At the time petitioner was injured, he was working in the C deck of the ship's No. 2 hold. After opening this cargo compartment, the longshoremen first removed the pre-slung units. The removal of these pre-slung units resulted in a key which was approximately 13 feet by 13 feet in size (1a-2a). At that point a two unit chandelier spreader was attached to the ship's cargo hook which the longshoremen then began using to discharge the other units which were in the hold. Petitioner, along with another longshoreman, was assigned to work in the key positioning the prongs of the chandelier spreader in the pallets of fruit (2a). The first draft of two palletized units was lifted from the hold without incident.[4] However, as the second draft of two palletized units was being lifted from the hold, one of the wood pallets broke apart, and the cartons of apples which

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3. In his brief in the Court of Appeals, counsel for respondents stated that respondents did "not deny they had actual knowledge of the size of the "key" in the "C" deck, No. 2 hatch" (Respondents' Brief in Court of Appeals at page 27).

4. The longshoremen use the term "draft" to refer to whatever is being lifted from the hold at any one time by the cargo gear. In the instant case, since the longshoremen were using a two unit chandelier spreader, the term "draft" refers to the two palletized units being lifted from the hold at any one time by the spreader.

were on it fell back down into the hold and several of them struck and injured petitioner. Because of the confined area of the key, petitioner could not avoid being under the draft of two palletized units as it was being lifted from the hold and could not avoid being hit by the falling cartons (2a).

In opposing the motion for summary judgment, petitioner submitted evidence, in the form of an affidavit from an expert in maritime cargo operations, that the key which was provided respondents was too small, and that it should have been large enough to permit the longshoremen working in it to be able to step back to a position where they would be at least 12 to 15 feet away from being under the units as they were being lifted from the hold (see Appendix in Court of Appeals, pages 130A-132A).

Notwithstanding this evidence, the district court, citing the decision in *Derr, supra*, held that the observation of the size of the key by the vessel's representatives did not give rise to a duty on the part of the shipowner to "supervise or inspect" the manner in which the cargo was stowed (7a), and that the vessel's duty to intervene in cargo operations, even where the vessel had actual knowledge of an unsafe condition, related only to unsafe conditions involving the ship and its equipment, and did not extend to unsafe conditions existing in a cargo stow (9a-11a).[5]

On appeal, the Third Circuit affirmed by Judgment Order, simply citing the decision in *Derr, supra*, as authority (14a-15a). Thereafter, a Petition for Rehearing was filed

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5. The district court also held that respondents had not breached any duty to warn of the unsafe condition created by the limited size of the key because this was a condition which was "open and obvious" (8a, 11a). However, this holding was superfluous as petitioner was not asserting a breach of any duty to warn as a basis for liability. Rather, liability was predicated on the existence of a hazardous condition which respondents had reason to know would not be remedied by petitioner's stevedore employer, *cf. Callen v. Oulu, O/Y,* 711 F.Supp. 244 (E.D. Pa. 1989), *aff'd.*, 897 F.2d 520 (1990).

requesting *in banc* consideration of the decision in *Derr*, as no Petition for Rehearing In Banc had been filed following the original *Derr* decision. This Petition for Rehearing was denied; however, three Judges of the Court, Judges Becker, Scirica and Cowen, stated that they would grant rehearing *in banc* (16a-17a). Judge Becker, who was a member of the panel which initially affirmed the district court decision, specifically stated that he "would grant rehearing so that the court *in banc* might reconsider" the decision in *Derr* (17a).

REASONS WHY THE WRIT SHOULD BE GRANTED

1. **The decision below, which is based on the decision in *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988), is in direct conflict with the decisions of the Court of Appeals for the Fifth Circuit, in *Woods v. Sammisa Co., Ltd. and Sammiline Co., Ltd., et al*, 873 F.2d 842 (5th Cir.), *petition for rehearing and for rehearing in banc denied*, 878 F.2d 1435 (5th Cir. 1989), *cert. denied*, 107 L.Ed.2d 847 (1990), *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), and *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), on the important and recurring issue of the vessel's liability for unsafe conditions caused by the defective stowage of cargo by an independent stevedore.**

In *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988), the Third Circuit held that a shipowner had no duty to inspect or supervise the manner in which cargo was stowed by a foreign stevedore, and, therefore, could not be held liable to a longshoreman who suffered injury as a consequence of the negligent and defective manner in which cargo may have been stowed by a foreign stevedore, see *Derr*, 835 F.2d at

495 (62a).[6] In the two cases that were before the Third Circuit in *Derr* there were factual issues as to whether the vessel had actual knowledge of the claimed hazardous conditions in the cargo stow, *i.e.*, -- cargo that was not adequately lashed and secured in the cargo stow. In the instant case, however, there was ample evidence of the shipowner's knowledge of the size of the key, and counsel for the shipowner has admitted such knowledge.[7] Since the Third Circuit affirmed the granting of summary judgment in the instant case solely on the authority of *Derr*, it is clear that the Third Circuit's view of the law is that such knowledge is irrelevant and that a shipowner is not liable for a negligent condition existing in a cargo stow *even if* the evidence establishes that the shipowner had actual knowledge of the condition.

The views of the Third Circuit, as illustrated by its decisions in *Derr* and the instant case, are in clear and unequivocal conflict with several decisions of the Fifth Circuit which, in similar factual situations, have held the shipowner liable for injuries caused to a longshoreman as a result of the negligent and defective manner in which cargo was stowed by a foreign stevedore. The most recent, and clearest, illustration of this conflict is the Fifth Circuit's decision in *Woods v. Sammisa Co., Ltd. and Sammiline Co., Ltd., et al*, 873 F.2d 842 (5th Cir.), *petition for rehearing and for rehearing in banc denied*, 878 F.2d 1435 (5th Cir. 1989), *cert. denied*, 107 L.Ed.2d 847 (1990) (25a).[8]

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6. The *Derr* decision is reproduced in the appendix hereto beginning at page 54a. In citing *Derr* in this petition we will cite both the official report of the *Derr* decision and the corresponding page in the appendix.

7. See footnote 3, *supra* page 6.

8. The decision in *Woods v. Sammisa Co., Ltd. et al*, is reproduced in the appendix hereto beginning at page 25a.

In *Woods*, as here, a longshoreman was discharging cargo that had been loaded in a foreign port by a foreign stevedore, and was injured because of the unsafe manner in which the cargo had been stowed. In *Woods* the longshoreman was injured when he fell into a gap in the cargo stow while running to avoid cargo (pipe) that began swinging as it was being lifted from the hold. The cause of the swinging of the pipe during the discharge operation originated in the unsafe manner in which the cargo had been loaded by the foreign stevedore. As in the instant case, the condition of the cargo stow which led to Woods' injury was known both to the vessel and to the discharging stevedore (Woods' employer).

At trial Woods contended, *inter alia*, that the vessel was negligent in failing to ensure that the loading stevedore in the foreign port stowed the cargo in such a manner that it could be discharged with reasonable safety (33a). Following a jury verdict in Woods' favor, the vessel (both owner and charterer) appealed. On appeal the vessel argued that the vessel's duty of reasonable care did not extend to the vessel's cargo, as distinguished from the vessel's gear and equipment, citing *Derr* as authority, 873 F.2d at 848 (32a). The Fifth Circuit rejected this argument and, in so doing, made it clear that it disagreed with the reasoning of the *Derr* decision. Instead, the Fifth Circuit stated that it would continue to follow its prior decisions in *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), and *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), which held that the vessel's duty of reasonable care encompassed hazardous conditions existing in a cargo stow as a result of faulty stowage by a loading stevedore. The Fifth Circuit stated, 873 F.2d at 848-849 (33a-34a):

> As in *Derr*, the essence of the Woodses' claim is that the defendants failed to exercise proper control over the stowage and discharge of the pipe cargo; the defendants thus urge us to follow *Derr*'s lead and hold that a vessel cannot be held liable for injuries resulting from the negligence of an independent stevedore.

Our court, however, has already visited this question and reached the opposite result. In *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. Sept. 1981), decided shortly after *Scindia*, a longshoreman injured during discharge operations sued the vessel owner under section 905(b), alleging that the owner was legally responsible for the negligent manner in which the cargo had been stowed and that such negligence was the cause of his injuries. An independent stevedore had loaded the cargo, and the plaintiff sought to hold the owner liable because the chief mate had actual knowledge that the stevedore was utilizing improper loading techniques. *Id.* at 116.

Although we noted the language in *Scindia* to the effect that the shipowner has no duty to supervise cargo operations or inspect the cargo, we extended *Scindia*'s imposition of a duty on the shipowner to correct, as to all dangerous conditions including those relating to cargo, equipment-related and other defects of which it has actual knowledge and which it actually knows the stevedore does not intend to correct. That duty extends to conditions that arise before or during stevedoring operations. In so holding in *Lemon*, we assumed that the shipowner has at least the power to control the actions of independent stevedores: We stated that this duty "furnishes an incentive to the shipowner to correct those dangerous conditions he recognizes in addition to those he actually creates." *Id.* at 115.

Without questioning our assumption that such power exists in theory and practice, we have continued to follow our holding in *Lemon*. *See Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 299 (5th Cir. 1984). Because we are bound by this court's prior decisions unless and until they are reconsidered en banc, we must decline to accept the defendants' argument that an owner/operator owes no duties to a stevedore and longshoreman with respect to cargo operations that are solely within the stevedore's control.

The foregoing excerpt from the *Woods* opinion serves to highlight the nature and extent of the continuing conflict between the Fifth Circuit and the Third Circuit with respect to the shipowner's responsibility for hazardous conditions arising from negligently stowed cargo. This conflict is significant because injuries to longshoreman due to improper stowage are a frequent and recurring event. The negative impact of the *Derr* decision on the right of longshoreman to recover damages for injuries resulting from improperly stowed cargo in the Third Circuit has been substantial. As an example, since *Derr* was decided, there have been at least five cases decided in the Eastern District of Pennsylvania in which summary judgment has been granted dismissing actions by longshoreman against vessels in which the granting of summary judgment was based wholly or substantially on the *Derr* decision. See *Whitfield v. Craigwin Co., Ltd,*, 727 F. Supp. 183 (E.D. Pa. 1989), *Thomas v. Kambara Kisen Co., Ltd.*, Civil Action No. 88-7243 (E.D. Pa. 1990), *Davis v. Kambara Kisen Co., Ltd.*, Civil Action No. 88-7245 (E.D. Pa. 1990), *Irby v. Tokai Lines*, Civil Action No. 88-6890 (E.D. Pa. 1990), *Brown v. Baltic Shipping Company*, Civil Action No. 87-1929 (E.D. Pa. 1988)(Bench Opinion). Had these actions been brought in the Fifth Circuit, it is reasonable to assume the summary judgment would not have been granted.

In the Legislative History which accompanied the 1972 amendments of Section 5(b) of the Longshore and Harbor Workers' Compensation Act, Congress specifically noted that it intended that the negligence remedy it was authorizing be uniformly applied in the various ports of the country (23a-24a). The presently existing conflict between the Third Circuit and the Fifth Circuit with respect to the vessel's responsibility for negligently stowed cargo has created a significant lack of uniformity which is ongoing in nature and which has had and will continue to have significant impact on longshoreman litigation and the implementation of the negligence remedy which Congress mandated. Accordingly, it is submitted that certiorari should be granted so that this conflict may be resolved.

2. The Third Circuit's holding that a vessel has no duty of care with respect to unsafe conditions in a cargo stow created by a loading stevedore is in conflict with this Court's decision in *Scindia Steam Navigation Co. v. De los Santos*, 451 US 156, 68 L Ed 2d 1 (1981), and contrary to the Congressional mandate, clearly set forth in the Legislative History, that the longshoreman's negligence remedy was to be similar to that available to persons engaged in shoreside, non-maritime employment.

In *Scindia Steam Navigation Co. v. De los Santos*, 451 US 156, 68 L Ed 2d 1 (1981), this Court set forth the basic principles governing a vessel's liability to longshoremen. Quoting *Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404, 22 L.Ed.2d 371 (1969), this Court stated, 451 U.S at 166-167:

> We held in Marine Terminals v. Burnside Shipping Co. 394 US 404, 415, 22 L Ed 2d 371, 89 S Ct 1144 (1969), that the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances." This duty extends at least to exercising ordinary care under the circumstances *to have the ship and its equipment* in such condition that an expert and experienced stevedore will be able to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. Id., at 416, n 18, 22 L Ed 2d 371, 89 S Ct 1144. (Emphasis supplied)

Beginning with this statement of the vessel's duty, this Court, in *Scindia*, then discussed the relationship between

the vessel and the injured longshoreman's stevedore employer in the context of the vessel's right to rely on the stevedore employer to protect the longshoreman from injuries caused by conditions arising during the course of stevedoring operations, see 451 U.S. at 170, 68 L.Ed.2d at 14.

While neither *Scindia* nor *Burnside* involved hazardous conditions existing in a cargo stow, the Third Circuit, in *Derr*, and *a fortiorari*, in the instant case, proceeded to interpret *Scindia* as *limiting* the shipowner's duty to the vessel's gear and equipment and excluding hazardous conditions existing in a cargo stow, see *Derr*, 835 F.2d at 495-496 (62a-63a). In so holding the Third Circuit also held that the limited responsibility which *Scindia* held that the vessel had for conditions arising during the cargo operations being performed by the injured longshoreman's stevedore employer also extended to the cargo operations performed by a foreign loading stevedore, see *Derr*, 835 F.2d at 494-495 (59a-61a). Both these holdings in *Derr* are in error.

While there is language in the *Scindia* decision limiting the vessel's duty to inspect the work of the stevedore once cargo operations have begun, it is clear that the stevedore being referred to is the injured longshoreman's stevedore employer, -- not some other stevedore, such as a foreign loading stevedore, who has no responsibility for the longshoreman's safety. It is clear both from *Scindia* and from the Legislative History of Section 5(b) of the Longshore and Harbor Workers' Compensation Act that the limitation on the duty of the vessel to inspect and supervise the work of stevedores relates *solely* to the work of the injured longshoreman's stevedore employer, and *not* to work performed by a foreign stevedore in a foreign port long before the vessel arrives in the United States.

In this regard, one of the most telling parts of the Legislative History is the House Committee's description of those types of accidents for which a vessel would no longer be liable. In describing the type of claims which no longer

could be brought, the Legislative History carefully and specifically refers to unsafe conditions created by stevedores **subject to the Act**, *i.e*, -- American, not foreign, stevedores, -- and cites a series of cases involving unsafe conditions attributable in whole or in part to the negligence of the injured longshoreman's stevedore employer, and not to some other stevedore such as a loading stevedore in another port. Thus, the Legislative History states (21a):

> Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores **subject to this Act**, *Crumedy v. The J. H. Fisser*, 358 U.S. 423, *Albanese v. Matts*, 382 U.S. 283, *Skibinski v. Waterman SS Corp.*, 330 F.2d 539; for the manner or method in which stevedores or employees of stevedores **subject to this Act** perform their work, *A. N. G. Stevedores v. Ellerman Lines*, 369 U.S. 355, *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367; for gear or equipment of stevedores or employees of stevedores **subject to this Act** whether used aboard ship, or ashore, *Alaska SS Co. v. Peterson*, 347 U.S. 396, *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence. (Emphasis in bold supplied)

The repeated references in the Legislative History to stevedores "subject to this Act", coupled with the holdings of the cases cited, cannot be ignored or viewed as accidental. If Congress had intended to free vessels from the obligation to inspect for and remedy unsafe conditions created by *all* stevedores, including a foreign stevedore in a loading port, it simply could have eliminated the phrase "subject to

this Act" from the description of the type of cases that were being eliminated. The fact that this phrase was not eliminated, but rather was repeated three times, is a clear manifestation that Congress did not so intend.

Throughout the Legislative History accompanying the 1972 amendments to Section 5(b) of the Longshore and Harbor Workers' Compensation Act there are repeated references to the intention of Congress that a longshoreman should have a negligence remedy similar to that available to persons engaged in shoreside, non-maritime employment. Thus the following excerpts appear in the Legislative History:

> . . . . The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, **just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.** (8a) (Emphasis in bold supplied)
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> * * *
>
> Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. **This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.** (20a-21a) (Emphasis in bold supplied)
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> * * *
>
> . . . The Committee intends that on the one hand an employee injured on board a vessel **shall be in no less**

favorable position *vis a vis* his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner **such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.** (22a) (Emphasis in bold supplied)

Under basic and well established principles of land side law, the employer of an independent contractor has the duty to inspect the work of that contractor once the contractor has *finished* its work and is liable for any unsafe conditions which such an inspection would disclose. The applicable principle is set forth in § 412 of the Restatement of Torts, 2d, as follows:

§ 412. Failure to Inspect Work of Contractor after Completion.

One who is under a duty to exercise reasonable care to maintain land or chattels in such condition as not to involve unreasonable risk of bodily harm to others and who entrusts the work of repair an maintenance to an independent contractor, is subject to liability for bodily harm caused by them by his failure to exercise such care as the circumstances may reasonably require him to exercise **to ascertain** whether the land or chattel is in reasonably safe condition **after the contractor's work is completed.** (Emphasis in bold supplied)

This same principle appears in § 422 of the Restatement of Torts, 2d:

§ 422. Work on Buildings and Other Structures on Land

A possessor of land who entrusts to an independent contractor construction, repair, or other work on the land, or on a building or other structure upon it, is

subject to the same liability as though he had retained the work in his own hands to others on or outside the land for physical harm caused to them by the unsafe condition of the structure

(a) while the possessor has retained possession of the land during the progress of the work, or

(b) **after he has resumed possession of the land upon its completion.** (Emphasis in bold supplied)

The maritime relationship between a shipowner and a stevedore is analogous to the land side relationship between a property owner and an independent contractor engaged to perform work on the property owner's land in that the stevedore is hired to perform work on the vessel, in connection with which work the stevedore brings its own employees on board the vessel and assumes principle control over the physical area where the cargo work is being performed; however, once that work is completed, the stevedore leaves the vessel and control over the area where the stevedore was working reverts back to the vessel. The principle is clear under land side law that, once the independent contractor has completed his work, control of the property reverts back to the property owner at which point the property owner has duty to inspect that work and to remedy any unsafe conditions found to exist. The Third Circuit's decision in the instant case and in *Derr*, in holding that a shipowner has no duty to inspect the work of a loading stevedore once the work of the loading stevedore has been completed, totally ignores this principle and the Congressional mandate as set forth in the Legislative History, and thereby deprives an injured longshoreman of an important part of the remedy which Congress has so clearly stated that the longshoreman was to have.

The non-employer stevedore is in a much different position from the employer stevedore in that, under the 1972 amendments, the vessel can still sue the non-employer stevedore for indemnity under the *Ryan Stevedoring* doc-

trine[9] should the shipowner be found liable for damages to an injured longshoreman, see *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1304 (9th Cir. 1981). Moreover, as between the shipowner and the injured longshoreman's stevedore employer, it is the shipowner which is best in position to prevent unsafe conditions from being created in a cargo stow by a loading stevedore, *Ibid*, see also *Woods v. Sammisa Co., Ltd., supra*, 873 F.2d at 855 (47a-48a).

In enacting the 1972 amendments to Section 5(b) of the Longshore and Harbor Workers' Compensation Act, one of the principle concerns of Congress in retaining the longshoreman's negligence remedy was to encourage vessel safety and the protection of the health and safety of longshoremen (20a). The Third Circuit decisions which severely limit the vessel's responsibility for unsafe conditions created in a cargo stow by a loading stevedore are in conflict with this objective. Accordingly, it is respectfully submitted that this Court should grant certiorari to resolve the conflict in decisions between the Third Circuit and the Fifth Circuit and clarify the law with respect to the vessel's responsibility for hazardous conditions created in a cargo stow by a loading stevedore.

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9. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 100 L.Ed. 133 (1956).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment below.

Respectfully submitted,

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